

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RENAE LOUISE COLOMBO,

Plaintiff,

V.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Case No. 3:10-cv-05620-KLS

ORDER REVERSING DEFENDANT'S
DECISION TO DENY BENEFITS AND
REMANDING FOR FURTHER
ADMINISTRATIVE PROCEEDINGS

Plaintiff has brought this matter for judicial review of defendant's denial of her application for disability insurance benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth below, the decision to deny benefits should be reversed and this matter should be remanded to defendant for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On September 12, 2006, plaintiff filed an application for disability insurance benefits, alleging disability as of September 2, 2005, due to severe neck instability, chronic pain and dizziness. See Administrative Record (“AR”) 11, 114, 200. Her application was denied upon initial administrative review and on reconsideration. See AR 11, 47, 51. A hearing was held before an administrative law judge (“ALJ”) on June 8, 2009, at which plaintiff, represented by

1 counsel, appeared and testified, as did a vocational expert. See AR 27-44. A supplemental
2 hearing also was held before the same ALJ on September 10, 2009, at which plaintiff's counsel,
3 but not plaintiff, appeared. See AR 22-26.

4 On September 25, 2009, the ALJ issued a decision in which plaintiff was determined to
5 be not disabled. See AR 11-20. Plaintiff's request for review of the ALJ's decision was denied
6 by the Appeals Council on July 8, 2010, making the ALJ's decision defendant's final decision.
7 See Tr. 1; see also 20 C.F.R. § 404.981. On August 31, 2010, plaintiff filed a complaint in this
8 Court seeking judicial review of the ALJ's decision. See ECF #1. The administrative record was
9 filed with the Court on November 12, 2010. See ECF #9. The parties have completed their
10 briefing, and thus this matter is now ripe for the Court's review.

12 Plaintiff argues the ALJ's decision should be reversed and remanded to defendant for an
13 award of benefits, because the ALJ erred: (1) in evaluating the opinions of Kim D. Christiansen,
14 D.C., and Michael J. Meno, PA-C; (2) in assessing plaintiff's credibility; (3) in evaluating the lay
15 witness evidence in the record; and (4) in finding plaintiff to be capable of returning to her past
16 relevant work as an administrative assistant. Defendant agrees the ALJ erred in evaluating the
17 lay witness evidence in the record, but argues that remand for further administrative proceedings,
18 rather than an outright award of benefits, is warranted. The Court also finds the ALJ erred in
19 determining plaintiff to be not disabled. For the reasons set forth below, however, the Court
20 agrees with defendant that while the decision to deny benefits should be reversed, this matter
21 should be remanded for further administrative proceedings.

24 DISCUSSION

25 This Court must uphold defendant's determination that plaintiff is not disabled if the
26 proper legal standards were applied and there is substantial evidence in the record as a whole to

1 support the determination. See Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986).
2 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to
3 support a conclusion. See Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767
4 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. See
5 Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F.
6 Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational
7 interpretation, the Court must uphold defendant's decision. See Allen v. Heckler, 749 F.2d 577,
8 579 (9th Cir. 1984).

10 I. The ALJ's Evaluation of the Medical Evidence in the Record

11 The ALJ is responsible for determining credibility and resolving ambiguities and
12 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).
13 Where the medical evidence in the record is not conclusive, "questions of credibility and
14 resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639,
15 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v.
16 Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining
17 whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at
18 all) and whether certain factors are relevant to discount" the opinions of medical experts "falls
19 within this responsibility." Id. at 603.

21 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings
22 "must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this
23 "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
24 stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences
25 "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may

1 draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881
2 F.2d 747, 755, (9th Cir. 1989).

3 A. Ms. Christianson

4 In arguing the ALJ erred in determining her to be not disabled, plaintiff first challenges
5 the ALJ's following findings:

6 The majority of the records and opinions found in the medical record are from
7 Kim D. Christensen, DC (Exhibits 3F, 6F, 7F, 17F, and 23F). A chiropractor
8 is also not a best medical source. The claimant had complaints of dizziness,
9 lightheadedness, and neck pain; in December 2005 there were increased
10 complaints of low back pain with left sciatic nerve involvement, and the
11 claimant was given a neck brace to wear in the afternoon and evening to avoid
12 neck flexion; in May 2006 neck pain extending into the left shoulder, and
13 radicular arm complaints when raising or elevating the arm, were added; in
14 July 2006 occasional bilateral lumbar radicular leg pain was added; and in
15 September and October of 2006 there were complaints of lightheadedness
16 present upon getting out of bed in the morning, persisting throughout the day,
17 until the claimant retired at night. Later, complaints of radicular pain in the
18 right arm, numbness in the right fingers, and aching in the jaw and neck were
19 added. Based on the medical model used, the chiropractic diagnosis was right
20 lumbar scoliosis; loss of cervical lordosis at C5-C6; cervical misalignment;
21 and cervical, thoracic, and lumbar myofascial hypertonicity. In contrast to
22 testimony and other statements, the records show periods where the claimant
23 was asymptomatic, such as March 2006 where the claimant reported that her
24 pain level was reduced to zero on a scale of ten. The records from this source
25 show intermittent symptoms in 2005, 2006, and 2007, and then more chronic
26 and strident complaints in 2008 and 2009. Despite the absence of objective
findings, in February 2007 the chiropractor wrote that the claimant
experiences cervical instability with cervicogenic dizziness due to C5-C6
flexion instability resulting from a 1996 motor vehicle accident (Exhibit 7F).
This statement continues, indicating that the claimant is unable to drive a
vehicle or work due to permanent dizziness, and that she requires assistance
in many areas of daily living. Later, in a February 24, 2009 statement, the
chiropractor explains that the claimant has been treated since November 5,
2004 for cervical instability due to C5-C6 flexion instability; this condition is
permanent and disabling; and the claimant is unable to drive or work due to
permanent dizziness (Exhibit 17F). On June 3, 2009 the chiropractor
completed a form in which the claimant is described as able to sit 30 minutes
at a time and 4 of 8 hours; stand 10 minutes at a time and 1 of 8 hours; walk
10 minutes at a time and 30 minutes of 8 hours; stand and walk 10 minutes at
a time and 30 minutes of 8 hours; may lift and carry a maximum of 5 pounds;
is unable to push and pull with either the right or left upper extremity; and

would be absent more than 4 days per month (Exhibit 18F). The record also contains May 27, [2]009 statement from this source explaining that the claimant has Barre-Lieou Syndrome, a dysfunction of the posterior cervical sympathetic nervous system, manifested or documented by headache; neck, facial, ear, and dental pain; tinnitus; vertigo; nausea; vomiting; blurred vision; tearing of the eyes; and sinus congestion. While this purported diagnosis is interesting, it is not made by a qualified medical professional; it is at odds with opinions expressed in medical journals; there is no documentation of a number of these symptoms; even with the myriad of symptoms reported by the claimant, her list does not include all of these; and this diagnosis is inconsistent with the findings of neurologists and specialists who have evaluated the claimant.

AR 17.

Plaintiff argues the ALJ did not provide any rationale – other than rejecting the diagnosis of Barre-Lieou Syndrome – for rejecting the work-related limitations found by Ms. Christiansen. The undersigned disagrees. The ALJ expressly pointed out that Ms. Christiansen's own progress notes reveal a long period of time where plaintiff experienced only intermittent symptoms and where, on at least one occasion, she actually was asymptomatic. See Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (discrepancies between opinion source's functional assessment and that source's clinical notes, recorded observations and other comments regarding claimant's capabilities is clear and convincing reason for not relying on that source's assessment); Weetman v. Sullivan, 877 F.2d 20, 23 (9th Cir. 1989) (same). The ALJ also specifically noted the absence of objective findings to support Ms. Christiansen's diagnoses and conclusions. See Batson v. Commissioner of Social Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004) (ALJ need not accept opinion of treating physician if it is inadequately supported by clinical findings). Accordingly, the Court finds no error by the ALJ here.

B. Mr. Meno

Plaintiff next challenges the following additional findings made by the ALJ:

Several sources have provided statements indicating that the claimant

1 experiences significant deficits, is incapable of ordinary functioning, and is
2 not able to engage in competitive employment. On May 3, 2007 the source
3 described as the primary care provider completed a questionnaire describing
4 the claimant as able to sit 1 hour at a time and 3 in 8 hours; stand a half hour
5 and 3 in 8 hours; walk a half hour and 2 in 8 hours; stand and walk a half hour
6 and 2 in 8 hours; able to lift and carry 5 pounds frequently and 10 pounds
7 occasionally, but unable to lift and carry 20 pounds; unable to push or pull
8 with the right upper extremity; unable to drive or work around unprotected
9 heights and moving machinery; missing more than 4 days a month; and unable
to work due to vertigo and neck pain (Exhibit 16F). The opinion of a primary
care provider is normally given significant weight. However, in this instance
the opinion and assessment are not supported by objective findings (Exhibits
2F and 10F). More importantly, while the individual may be competent,
Michael J. Meno, PA[-C] is a physician's assistant and, consequently, not a
best medical source.

10 AR. 16-17.

11 As discussed above, an ALJ need no accept the opinion of a treating medical source if it
12 is inadequately supported by clinical findings. Batson, 359 F.3d at 1195. As noted by the ALJ,
13 the questionnaire Mr. Meno completed contains little if any objective clinical findings to support
14 the significant functional limitations contained therein. See AR 449-50. Plaintiff points to the
15 fact that the record contains diagnostic studies showing the presence of a disc bulge and a disc
16 protrusion, as well as some neurological involvement, and that it shows she was given the option
17 of having a surgical discectomy and artificial disc replacement. See AR 426-27. But the mere
18 existence of an impairment or availability of less conservative treatment options by themselves
19 do not form a sufficient basis upon which to establish the existence of significant work-related
20 limitations, let alone a finding of disability. See Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir.
21 1993). Thus, here too the ALJ did not err in rejected Mr. Meno's opinion.

22 II. The ALJ's Assessment of Plaintiff's Credibility

23 Questions of credibility are solely within the control of the ALJ. See Sample v.
24 Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). The Court should not "second-guess" this

1 credibility determination. Allen, 749 F.2d at 580. In addition, the Court may not reverse a
2 credibility determination where that determination is based on contradictory or ambiguous
3 evidence. See id. at 579. That some of the reasons for discrediting a claimant's testimony should
4 properly be discounted does not render the ALJ's determination invalid, as long as that
5 determination is supported by substantial evidence. Tonapetyan v. Halter, 242 F.3d 1144, 1148
6 (9th Cir. 2001).

7 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent
8 reasons for the disbelief." Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).
9 The ALJ "must identify what testimony is not credible and what evidence undermines the
10 claimant's complaints." Id.; see also Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless
11 affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the
12 claimant's testimony must be "clear and convincing." Lester, 81 F.2d at 834. The evidence as a
13 whole must support a finding of malingering. See O'Donnell v. Barnhart, 318 F.3d 811, 818 (8th
14 Cir. 2003).

15 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of
16 credibility evaluation," such as reputation for lying, prior inconsistent statements concerning
17 symptoms, and other testimony that "appears less than candid." Smolen v. Chater, 80 F.3d 1273,
18 1284 (9th Cir. 1996). The ALJ also may consider a claimant's work record and observations of
19 physicians and other third parties regarding the nature, onset, duration, and frequency of
20 symptoms. See id.

21 In regard to plaintiff's credibility in this case, the ALJ found in relevant part:

22 . . . After careful consideration of the evidence, the undersigned finds that the
23 medically determinable impairments could reasonably be expected to cause
24 some of the alleged symptoms. However, her statements concerning the
25 intensity, persistence, and limiting effects of these symptoms are not credible

1 to the extent they are inconsistent with the . . . residual functional capacity
2 assessment [made by the ALJ and discussed below].
3
4 . . .
5

6 As a whole, the objective medical records from acceptable, competent, credible
7 sources neither show the problems alleged by the claimant and diagnosed by
8 other sources, nor support the degree or level of dysfunction alleged and
9 associated with the same. Further, competent [medical] sources . . . show that
10 the claimant has reasonable treatment available if she chooses to accept such
11 treatment. Even the information from the naturopathic doctor [plaintiff saw in
12 March and May 2009] does not reflect the degree of dysfunction alleged and
13 reported elsewhere, and also notes improvement. The allegations of the
14 claimant also do not serve her well. The objective evidence, including x-rays,
15 MRI, and disco gram, shows only minimal vertebrogenic findings. However,
16 by way of example, in [an early July 2009] interview with psychologist [Daryl]
17 Birney[, Ph.D.,] the claimant reported that she has 3 ruptured cervical discs, a
18 clearly erroneous allegation easily refuted by readily available information.
19 The claimant alleges significant dizziness so persistent and severe that she is
20 unable to function, but objective testing shows only very mild motion
21 sensitivity. The medical records also discuss evaluations for symptoms
22 thought to be cardiac problems, but results show no objective evidence of a
23 problem. While reporting significant pain and dysfunction, when medications
24 are listed they include a mild muscle relaxant, Tylenol 3, and medication for
25 birth control. The allegations of dysfunction and disability are unsupported by,
26 as well as contradicted by, the credible medical evidence of record. . . .

16 AR 15, 19. The Court finds the ALJ gave valid reasons for discounting plaintiff's credibility
17 here. See AR Smolen, 80 F.3d at 1284 (ALJ may consider testimony that appears less than
18 candid); Meanal v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (ALJ properly considered failure
19 of physician to prescribe, and of claimant to request, serious medical treatment for supposedly
20 excruciating pain); Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995) (ALJ properly found
21 prescription of physician for conservative treatment only to be suggestive of lower level of pain
22 and functional limitation); Regennitter v. Commissioner of SSA, 166 F.3d 1294, 1297 (9th Cir.
23 1998) (ALJ's determination that claimant's complaints are inconsistent with clinical observations
24 can satisfy clear and convincing requirement).
25
26

The only reason plaintiff specifically challenges here, is the ALJ's determination that her
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1 allegations of disabling symptoms is inconsistent with the objective medical evidence in the
2 record, asserting – as she did with respect to the ALJ’s evaluation of the opinion provided by Mr.
3 Meno – that there is in fact objective medical evidence. But, as discussed above, that evidence in
4 itself is not sufficient to establish the existence of significant work-related limitations, let alone a
5 finding of disability. Accordingly, once more the ALJ committed no error here.
6

7 **III. The ALJ’s Evaluation of the Lay Witness Evidence in the Record**

8 Lay testimony regarding a claimant’s symptoms “is competent evidence that an ALJ must
9 take into account,” unless the ALJ “expressly determines to disregard such testimony and gives
10 reasons germane to each witness for doing so.” Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.
11 2001). In rejecting lay testimony, the ALJ need not cite the specific record as long as “arguably
12 germane reasons” for dismissing the testimony are noted, even though the ALJ does “not clearly
13 link his determination to those reasons,” and substantial evidence supports the ALJ’s decision.
14 Id. at 512. The ALJ also may “draw inferences logically flowing from the evidence.” Sample,
15 694 F.2d at 642.

16 The record contains written statements from plaintiff’s family members, in which they set
17 forth their observations of her symptoms and limitations. See AR 125-28. In regard thereto, the
18 ALJ stated as follows:

19 Statements by family members support the allegations of the claimant.
20 Marlys Metcalf, the claimant’s mother, writes that she experiences severe
21 debilitating pain; is often unable to engage in any ordinary activities; and
22 requires routine assistance (Exhibit 2E). The claimant’s brother, Brandon
23 Metcalf, writes that his sister experiences neck pain, headaches, chest pain,
24 dizziness, and spells of nausea such that she is often flat on her back (Exhibit
2E). He notes that she is unable to drive, has dizziness, and feels faint.
25 Allison Putnam, the claimant’s sister, writes that driving any distance is a
26 strain; the claimant does basic chores and is exhausted by the end of the day;
problems focusing the eyes causes difficulty reading; she is only able to hold a
6 month infant for a few minutes; and a wrong movement or slight bump will
throw her neck out, causing more pain, dizziness, and other symptoms

1 (Exhibit 2E). Finally, Michael Colombo, the claimant's husband, writes that
2 she has experienced chronic pain and dizziness for three and a half years; is
3 not able to drive on a regular basis; must wear a neck brace to go down the
4 driveway; and has problems using the right arm, being unable to lift the right
5 arm when neck symptoms are exacerbated (Exhibit 2E). The husband also
6 related that he has taken numerous days off work when the claimant was
7 incapacitated and has received shared leave donated by coworkers. The
8 statements from these sources are consistent and uniform. They are credible
9 in that the sources have reported their observations of activities, complaints
10 regarding symptoms and limitations, explanations related to them, and pain
11 behavior demonstrated in their presence. However, these sources do not have
12 information regarding valid medical factors causing either alleged dysfunction
13 or reported symptoms and whether these are in proportion to objective
14 medical findings.

15 AR 16. Plaintiff argues, and defendant concedes, that the ALJ erred in rejecting the lay witness
16 evidence in the record for the above stated reason. The Court too finds the ALJ erred here. As
17 both parties note, defendant's own regulations provide that in addition to considering evidence
18 from medical sources, also considered is evidence from other non-medical sources to show the
19 severity of a claimant's impairments and how those impairments affect his or her ability to work.

20 See 20 C.F.R. § 416.913(d); see also *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993)
21 (family members in position to observe claimant's symptoms and daily activities are competent
22 to testify as to claimant's condition); Social Security Ruling ("SSR") 06-03p, 2006 WL 2329939

23 *2 (other sources, such as family members, may have special knowledge of claimant and may
24 provide insight into severity of claimant's impairments and their impact on claimant's ability to
25 function). Thus, the fact that the lay witnesses in this case did not have access to the medical
26 evidence in the record is not a valid basis for rejecting their personal observations of plaintiff's
symptoms and limitations.

27 IV. The ALJ's Step Four Determination

28 If a disability determination "cannot be made on the basis of medical factors alone at step
29

1 three of [defendant's sequential disability] evaluation process,”¹ the ALJ must identify the
2 claimant’s “functional limitations and restrictions” and assess his or her “remaining capacities
3 for work-related activities.” SSR 96-8p, 1996 WL 374184 *2. A claimant’s residual functional
4 capacity (“RFC”) assessment is used at step four to determine whether he or she can do his or her
5 past relevant work, and at step five to determine whether he or she can do other work. See id. It
6 thus is what the claimant “can still do despite his or her limitations.” Id.

7
8 A claimant’s residual functional capacity is the maximum amount of work the claimant is
9 able to perform based on all of the relevant evidence in the record. See id. However, an inability
10 to work must result from the claimant’s “physical or mental impairment(s).” Id. Thus, the ALJ
11 must consider only those limitations and restrictions “attributable to medically determinable
12 impairments.” Id. In assessing a claimant’s RFC, the ALJ also is required to discuss why the
13 claimant’s “symptom-related functional limitations and restrictions can or cannot reasonably be
14 accepted as consistent with the medical or other evidence.” Id. at *7.

15
16 In this case, the ALJ found plaintiff had the residual functional capacity:

17 **... [T]o perform light work . . . , compromised by sitting and standing at
18 will; lifting and carrying 5 pounds frequently and 10 pounds
19 occasionally; no lifting above shoulder height; no frequent reaching; no
driving of a motor vehicle; and work involving simple repetitive tasks.**

20 AR 15 (emphasis in original). At step four of the sequential disability evaluation process, the
21 ALJ found plaintiff could perform her past relevant work as an administrative assistant, finding
22 further in relevant part that:

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24

¹ Defendant employs a five-step “sequential evaluation process” to determine whether a claimant is disabled. See 20
25 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step
26 thereof, the disability determination is made at that step, and the sequential evaluation process ends. See id. At step
three, the ALJ must evaluate the claimant’s impairments to see if they meet or medically equal any of the
impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. See 20 C.F.R. § 416.920(d); Tackett v. Apfel, 180
F.3d 1094, 1098 (9th Cir. 1999). If any of the claimant’s impairments meet or medically equal a listed impairment,
he or she is deemed disabled. Id.

1 In her testimony vocational expert Nancy E. Bloom assessed the past work of
2 the claimant, identifying past relevant work, exertional levels, and skill
3 requirements. The vocational expert listed the sedentary skilled position of
4 administrative assistant; the light skilled jobs of bank supervisor and teller
5 supervisor; the light skilled position of bank teller; and the light semiskilled
6 job of office assistant. The work of baker was described as skilled and both
7 light and medium, but it does not appear that this work satisfies the definition
8 of past relevant work. When presented with the residual functional capacity
9 described above, including all limitations and restrictions, vocational expert
10 Bloom explained that the claimant would be capable of performing her past
11 relevant work as an administrative assistant.

12 In comparing the claimant's residual functional capacity with the physical and
13 mental demands of this past relevant work, the undersigned finds that the
14 claimant, a younger individual with more than a high school education, was
15 able to perform this work as actually and generally performed, under the
16 description and definition of the vocational expert. . . .

17 AR 19-20.

18 Plaintiff argues the ALJ erred in finding her capable of performing such work. She has
19 the burden at step four of the disability evaluation process to show that she is unable to return to
20 her past relevant work. Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999). This burden
21 has been met here. First, as noted by plaintiff, despite his statement to the contrary the ALJ did
22 not provide the vocational expert with his complete RFC assessment. Namely, the ALJ left out
23 the no frequent reaching limitation. Instead, the ALJ stated at the hearing that reaching would be
24 “limited to frequent.” AR 41. Clearly these are not the same.

25 As such, the hypothetical question cannot be said to accurately describe all of plaintiff's
26 functional limitations. Because the ALJ's step four determination is based on the testimony of
the vocational expert, furthermore, and because that testimony is based on a flawed hypothetical
question, it is not at all clear that this determination is supported by substantial evidence. Indeed,
also as noted by plaintiff, the description of the job of administrative assistant is described by the
Dictionary of Occupational Titles (“DOT”) as requiring frequent reaching, which unquestionably

1 would be precluded by the limitation to no frequent reaching contained in the ALJ's assessment
2 of plaintiff's RFC. See DOT 169.167-010.

3 In addition, again as noted by plaintiff, the job of administrative assistant is described by
4 the DOT as requiring a special vocational preparation ("SVP") of 7, which in turn is defined as
5 requiring an individual to have performed the job for a period of over two years and up to and
6 including a period of four years. See id.; see also DOT, Appendix C (defining SVP as amount of
7 lapsed time required by typical worker to learn techniques, acquire information and develop
8 facility needed for average performance in specific job-worker situation). Because the record
9 shows plaintiff did not perform the job of administrative assistant for the requisite period of time
10 (see AR 162), this too shows the ALJ's step four determination is not supported by substantial
11 evidence. Lastly, although not specifically raised as an issue here by plaintiff, the Court finds
12 the ALJ's error in evaluating the lay witness evidence in the record discussed above, further calls
13 into question not only the accuracy of his assessment of her residual functional capacity, but his
14 step four determination as well.

17 V. This Matter Should Be Remanded for Further Administrative Proceedings

18 The Court may remand this case "either for additional evidence and findings or to award
19 benefits." Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the
20 proper course, except in rare circumstances, is to remand to the agency for additional
21 investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations
22 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is
23 unable to perform gainful employment in the national economy," that "remand for an immediate
24 award of benefits is appropriate." Id.

26 Benefits may be awarded where "the record has been fully developed" and "further

1 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan
2 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
3 where:

4 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
5 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
6 before a determination of disability can be made, and (3) it is clear from the
7 record that the ALJ would be required to find the claimant disabled were such
evidence credited.

8 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

9 Because issues still remain with respect to the lay witness evidence in the record, plaintiff’s RFC
10 assessment and her ability to perform her past relevant work, this matter should be remanded to
11 defendant for further administrative proceedings. If on remand it is determined that plaintiff is
12 incapable of performing her past relevant work, then defendant shall proceed on to step five of
13 the sequential disability evaluation process to determine if plaintiff is able to perform other jobs
14 existing in significant numbers in the national economy.

15 Plaintiff argues the Court should credit the lay witness statements as true in this case, in
16 light of the ALJ’s erroneous evaluation thereof. It is true that where lay witness evidence has
17 been improperly rejected, that testimony may be credited as a matter of law. See Schneider v.
18 Barnhart, 223 F.3d 968, 976 (9th Cir. 2000) (finding that when lay evidence rejected by ALJ is
19 given effect required by federal regulations, it became clear that claimant’s limitations were
20 sufficient to meet or equal listed impairment). As noted by the Ninth Circuit, though, the courts
21 do have “some flexibility” in how they apply the “credit as true” rule. Connett v. Barnhart, 340
22 F.3d 871, 876 (9th Cir. 2003).

23 Further, unlike here, Schneider dealt with the situation where defendant failed to cite any
24 evidence to contradict the statements of five lay witnesses regarding her disabling impairments.

1 223 F.3d at 976. Because other evidence does contradict the lay witness statements in this case –
2 in particular the objective medical evidence in the record, which as discussed above, the ALJ did
3 not err in evaluating – the Court declines to apply the credit as true rule here. Rather, on remand
4 defendant shall reconsider those statements in light of the other evidence in the record regarding
5 plaintiff's impairments and limitations.

6 CONCLUSION

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8 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded
9 plaintiff was not disabled. Accordingly, the Court hereby reverses defendant's decision to deny
10 benefits and therefore remands this matter to defendant for further administrative proceedings in
11 accordance with the findings contained herein.

12 DATED this 11th day of July, 2011.

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16 Karen L. Strombom
17 United States Magistrate Judge
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